No. 99-529

IN THE

Supreme Court of the United States

VICTORIA TALYANSKY,

Petitioner,

v.

XEROX and J.M. ISHLER, as Division Manager,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The petition accurately lists the parties to the proceeding.

Respondent Xerox has no parent companies.

There are no publicly owned companies who own more than 10% of Respondent Xerox' outstanding stock, however, State Street Bank & Trust Co. has a beneficial ownership of Xerox shares in excess of 10% in its fiduciary capacity as Xerox plan administrator.

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STATUTE INVOLVED

42 U.S.C. § 2000e-5(e):

Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system

> (1) A charge under this section shall be filed within one hundred and eight days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

STATEMENT OF THE CASE

This petition seeks this Court's review of the lower courts' decisions to dismiss the Complaint of petitioner Victoria Talyansky ("petitioner") and grant judgment in favor of respondents, Xerox Corporation ("Xerox") and J.M. Ishler, Division Manager ("Ishler"). The lower courts held that it was evident from the face of the complaint and the documents attached to it that petitioner failed to satisfy the jurisdictional prerequisites for suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, ("Title VII"). As detailed below, there is no cause for review of the lower courts' decisions.

Petitioner commenced this action by filing a Complaint in the United States District Court for the Western District of New York on or about September 8, 1997. (AA 1-2,[1] Complaint). As alleged in her Complaint, petitioner was retained as a contract worker by Xerox from 1990 until her discharge in October 1994. (AA 1-2, Complaint ¶¶ 4-6). Although the allegations in the Complaint are vague and confusing, petitioner essentially alleged that she was subject to some sort of hostile environment in 1993 while she worked at Xerox. (AA 6, Complaint ¶ 19). She further alleged that she was discharged in 1994 in retaliation for complaining about this environment. (*Id.*). Finally, petitioner claimed that she believed Xerox gave out poor references about her to potential employers as a form of post-employment retaliation. (*Id.*). According to the Complaint, these subsequent acts of discrimination allegedly occurred on September 28, 1994. (AA 4, Complaint ¶ 6).

1. References to the Appendix to the Second Circuit are referred to as ("AA [page number]"). References to Petitioner's Appendix to the petition are ("PA [page number]").

Respondents, Xerox and J.M. Ishler, moved to dismiss the Complaint in its entirety, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, on the grounds that petitioner failed to satisfy the jurisdictional prerequisites for suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* (AA 12-30). Respondents also moved to dismiss the Complaint against J.M. Ishler on the grounds that Title VII does not impose liability on individual supervisors because individuals are not "employers" within the meaning of Title VII. (*Id.*).

In a written Decision and Order, dated September 30, 1998, the District Court dismissed the Complaint in its entirety. (AA 50-55). Giving petitioner every reasonable benefit as a *pro se* plaintiff and accepting the allegations in the Complaint as true, the District Court found that petitioner "did not file her administrative charge until almost three years after the allegedly discriminatory conduct, clearly outside the three hundred day requirement." *Id.* The District Court further found that petitioner provided no grounds for waiver, estoppel or tolling of the filing requirement. (*Id.*).

With respect to the allegation that Xerox continued to retaliate against her by giving out negative job references, the District Court noted that the EEOC had dismissed this charge because petitioner had provided no evidence that Xerox had given her a bad reference in the 300 days prior to the filing of her charge or that petitioner had even applied for a job within that time. (PA 9). Under these circumstances, the District Court found that petitioner's "EEOC charge was woefully inadequate to satisfy the requirement that she file a timely charge with the EEOC prior to bringing suit in federal court." (PA 9).[2]

2. The District Court did not reach the issue of whether liability could be imposed against J.M. Ishler, individually, under Title VII.

Petitioner appealed the judgment to the United States Court of Appeals for the Second Circuit on October 14, 1998. After briefing and hearing oral argument, the Circuit affirmed the District Court's decision in a summary order, dated June 29, 1999. (PA 1-4).

The Circuit Court correctly held that the time began to run for petitioner's hostile work environment and retaliatory discharge claims when she was terminated from her job in October 1994, and that her claims were time-barred because petitioner did not file an EEOC charge until April 1997 — almost three years after the alleged discriminatory actions. (PA 3). The Circuit Court also agreed that petitioner was not entitled to waiver, modification or estoppel of the 300 day time limit. (PA 3). The Circuit Court noted that because petitioner believed she was being retaliated against at the time she was being fired, the mere fact that petitioner did not know the reason for why Xerox terminated her until March 1997 did not toll the limitations period. (PA 3). The Circuit Court further held that petitioner was not entitled to equitable tolling on the grounds that she is an immigrant and unskilled in the law. (*Id.*).

Finally, the Court affirmed the dismissal of petitioner's continuing retaliation claim on the grounds that petitioner submitted no evidence that Xerox has interfered with her ability to get a job or that it even provided negative references to prospective employers. (PA 3).

Petitioner served her Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit on September 24, 1999.

STATEMENT OF FACTS

On July 21, 1997, petitioner filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). (AA 9). In her charge, petitioner claimed that she was retained as a contract worker by Xerox from 1990 until her discharge in October 1994. (AA 6, Complaint ¶¶ 4-6). Although vague and confusing, the charge essentially alleged that she was subject to some sort of hostile environment in 1993 and that she was discharged in 1994 in retaliation for complaining about this environment. (AA 6, Complaint ¶ 19). Petitioner also claimed that she believed Xerox gave out poor references about her to potential employers as a form of post-employment retaliation. (*Id.*).

On July 31, 1997, the EEOC issued a Dismissal and Notice of Right to Sue letter and advised petitioner that her claims were dismissed because her "charge was not filed within the time required by law." (AA 8, 10-11, Dismissal and Notice of Rights and July 31, 1997 EEOC letter to Talyansky). The EEOC determined that the alleged harassment and discharge that petitioner complained of "clearly happened more than 300 days" before any charge was filed with the EEOC. (AA 10, July 31, 1997 EEOC letter). The EEOC further determined that her allegations of Xerox giving out poor job references was very vague, unsupported by any evidence that such conduct occurred within 300 days prior to the charge, and unsupported by evidence that petitioner had even applied for a job within that period of time. (*Id.*).

Following receipt of the Notice and the EEOC letter, petitioner commenced this action by filing a Complaint in the United States District Court for the Western District of

New York on or about September 8, 1997. (AA 1-2). The allegations in the Complaint essentially mirrored the allegations in petitioner's EEOC charge. (*Id.*)

REASONS FOR DENYING THE WRIT

The lower courts' dismissal of petitioner's Complaint was based upon well settled law, and there is no cause for this Court's review of this matter. Petitioner's complaint was properly dismissed because it was evident from the face of the Complaint and the documents petitioner attached to it that she could prove no set of facts that would entitle her to relief under Title VII of the Civil Rights Act. Writ of Certiorari should be denied because the decisions below correctly applied well-settled law, no conflict among the circuits is alleged, and the courts below did not depart from the accepted course of judicial proceedings in rendering their decisions.

I.

THE COURTS BELOW APPLIED THE PROPER STANDARD IN GRANTING RESPONDENTS' MOTION TO DISMISS

It is well settled law that Rule 12(b)(6) of the Federal Rules of Civil Procedure authorizes a trial court to dismiss an action where, as in this case, it appears from the face of the Complaint and from any documents attached to it that the plaintiff could prove no set of facts in support of her claim. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Still v. DeBuono*, 101 F.3d 888, 890 (2d Cir. 1996); *Cortec Industries, Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991), *cert. denied*, 503 U.S. 960 (1992). "The issue is

not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims." *Scheuer*, 416 U.S. at 236.

In determining the sufficiency of petitioner's Complaint, the courts below properly limited their consideration to the allegations in the Complaint, which they accepted as true, as well as to the documents petitioner attached to the Complaint or incorporated into it by reference, and documents in plaintiff's possession or documents which plaintiff had knowledge of and relied on in bringing suit. *Brass v. American Film Technologies, Inc.*, 987 F.2d 142, 150 (2d Cir. 1993). The courts below recognized that there was a strong burden on respondents on a motion to dismiss, but nevertheless found that the respondents had met their burden. As discussed below, this finding is amply supported and fully justified by the allegations in petitioner's Complaint and the documents she attached to it.

II.

PETITIONER'S CLAIMS ARE CONCEDEDLY TIME-BARRED

It is well-settled that under Title VII the statute of limitations for filing a charge of discrimination with the EEOC is 300 days in states that have an agency with the authority to address charges of discriminatory employment practices. 42 U.S.C. § 2000e-5(e). Since New York has such an agency, a plaintiff must file a charge of discrimination with the EEOC within 300 days of the alleged unlawful occurrence. *Butts v. New York Dep't of Hous. Preservation & Dev.*, 990 F.2d 1397, 1401 (2d Cir. 1993). If this requirement is not met, any claim filed in federal court is

time-barred. *Butts v. City of New York Dep't. of Hous. Preservation and Dev.*, 990 F.2d 1397, 1401 (2d Cir. 1993). Petitioner does not claim, nor is there in fact, any dispute among the Circuits in this regard.

In her Complaint, petitioner sought relief for allegedly discriminatory acts that occurred during a period of time between 1993 and October 1994, (AA 4, 6, Complaint ¶¶ 6, 19), but waited nearly three years after these allegedly discriminatory events before filing a charge with the EEOC. (AA 9). Accordingly, the lower courts correctly found that petitioner did not timely file her administrative charge, and dismissed her claims. (AA 53-54, PA 2-3). Under well-established law, petitioner's time period within which to commence suit was measured from the date of her discharge in 1994. *Chardon v. Fernandez*, 454 U.S. 6, 8 (1981) (300 days runs from date when employee received notice of termination); *Morse v. University of Vermont*, 973 F.2d 122, 125 (2d Cir. 1992) (*quoting O'Malley v. GTE Service Corp.*, 758 F.2d 818, 820 (2d Cir. 1985) ("[t]imeliness of a discrimination claim is measured from the date the claimant receives notice of the allegedly discriminatory decision")).

The lower courts also correctly found that petitioner's continuing retaliation claim was woefully inadequate. (AA 54-55). Neither the Complaint itself nor petitioner's attached EEOC charge alleged any instances where Xerox gave her a poor reference within 300 days of the filing of the charge. (AA 6, 9, Complaint and EEOC Charge). In fact, and instead of pointing out any alleged instances where Xerox provided a poor reference, petitioner attached to her Complaint a letter from the EEOC which stated that petitioner had *no* evidence suggesting that Xerox had given her a bad reference in the 300 days prior to the filing of her charge

and, indeed, no evidence that she had even applied for a job 300 days prior to the charge.[3] (AA 10-11, July 31, 1997 EEOC letter to Talyansky). In the same attached letter, the EEOC further noted that a letter from a temporary agency which petitioner relied upon to support her claim, did not in any way show that Xerox had ever told any prospective employer that petitioner was discharged because she could not get along with co-workers. (*Id.*).

Since the EEOC's letter was attached to her Complaint, it was properly considered by the courts below as part of the pleadings. *International Audiotext Network, Inc. v. American Tel. and Tel. Co.*, 62 F.3d 69, 72 (2d Cir. 1995) (a "complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference").

The lowers courts' decisions with respect to the timeliness and sufficiency of petitioner's allegations are consistent with the established law of this Court and do not conflict with other courts of appeal or depart from the usual course of judicial proceedings.

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3. Based on her submission to this Court, it now appears that petitioner's allegations concern a position that she held with Mercury Print Millennium and Syracuse Language Systems in 1994 and 1995. (*See* Petitioner's Brief pp. 6-7). To the extent that petitioner sought relief for unspecified discriminatory acts that occurred in 1994 and 1995, those claims are also time-barred.

III.

PETITIONER'S CLAIMS ARE NOT GOVERNED BY A THREE-YEAR STATUTE OF LIMITATIONS PERIOD

Petitioner contends that a three year statute of limitations should govern her claim because she has evidence of conduct that she contends is "deliberate discrimination." (Petitioner's Brief, p. 15). As discussed above, this case is not governed by a three-year limitations period. Moreover, none of the cases cited by petitioner supports this proposition. Petitioner, for example, cites *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988) (willful violations of the Fair Labor Standards Act) and *Cash v. Jefferson Assocs., Inc.*, 978 F.2d 217 (5th Cir. 1992) (willful violations of the ADEA). Those case are inopposite because they are outside the context of Title VII and involve completely different statutory schemes. Petitioner's reliance on *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), is also misplaced. *Robinson* holds that a former employee can sue an employer for post-employment discriminatory actions under Title VII, but it does not obviate the need to file a charge of discrimination with the EEOC within three hundred days of the allegedly discriminatory conduct. Finally, *Walters v. Metropolitan Educ. Enterprises, Inc.*, 519 U.S. 202 (1997) and *Ross v. St. Augustine's College*, 103 F.3d 338 (4th Cir. 1996), do not even address the issue, let alone suggest that Title VII provides for a three-year statute of limitations period.

Although petitioner requests that the "time limits [] be officially extended to a 3-year statute of limitations," this is not the appropriate forum to make such a request. That request should instead be brought to the attention of Congress.

IV.

THERE ARE NO GROUNDS FOR EQUITABLE TOLLING

The lower courts properly concluded that petitioner provided no grounds for waiver, estoppel or tolling of the 300-day limitations period. (AA 54, PA 3). In opposing the motion before the district court, petitioner contended that she did not seek any legal protection both because she was not experienced and because "she thought that she would get another job pretty soon." (AA 32, Appellant's Responding Papers in Support of Charge, p. 2).

As the courts below correctly found, petitioner's alleged unfamiliarity with statutory requirements and legal and administrative procedures simply do not justify the application of equitable principles to forgive "strict adherence to procedural requirements specified" by Congress in Title VII. *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980). The lower courts correctly held that equitable tolling was not warranted merely because petitioner is an immigrant and unskilled in the law. "Procedural requirements established by Congress for gainful access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants." *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 152 (1984).

Petitioner also contended that she had placed a telephone call to the Buffalo office of the EEOC a few days after she was fired but did not get any help. (AA 32, Appellant's Responding papers in Support of Charge, p. 2).

Placing a telephone call to the EEOC did not satisfy petitioner's obligation to file a timely charge of discrimination nor does it constitute a basis for equitable tolling. To constitute a valid charge under Title VII, a charge must be in writing and under oath. 42 U.S.C. § 2000e-5(b). A mere telephone call does not suffice nor does it warrant tolling. *Conaway v. Control Data Corporation*, 955 F.2d 358, 363 (5th Cir. 1992), *cert. denied*, 506 U.S. 864 (1992).

On appeal, petitioner for the first time alleged that she also had trouble contacting the EEOC by phone in 1997 and could not receive mail from the EEOC because someone was "controlling" her mail. (Appellants Brief p. 11). Since this claim was not presented in the district court and was based upon allegations outside the record on appeal, it was not properly considered by the Circuit Court on review, *Hoar v. Sara Lee Corp.*, 900 F.2d 522 (2d Cir. 1990), nor is it properly before this Court. *See Yee v. Escondido*, 503 U.S. 519, 533 (1992) (this Court does not consider issues not raised in court below). In any event, equitable tolling on the basis of alleged events occurring in 1997 would not extend petitioner's time to file a timely charge based on discriminatory acts that occurred during 1993 and 1994.

Once again, the courts below correctly applied well-settled law. No conflict among the circuits is alleged, and the courts below did not depart from the usual course of judicial proceedings in rendering its conclusion.

CONCLUSION

For the reasons discussed above, respondents, Xerox Corporation and J.M. Ishler, respectfully request that petitioner's request for Certiorari be denied.

Respectfully submitted,

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